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SUPREME COURT U. S.

No. 29 Original.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1920.

EX PARTE, IN THE MATTER OF LINCOLN GAS AND ELECTRIC LIGHT COMPANY, PETITIONER.

PETITIONER'S MOTION AND PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

ROBERT A. BROWN, of St. Joseph, Mo.
MAXWELL V. BEGHTOL, of Lincoln, Neb.
Attorneys for Petitioner.

CHARLES A. FRUEAUFF, of New York City,
WADE H. ELLIS, of Washington,
Of Counsel.

WEKESSER COMPANY, Law Briefs, Lincoln, Neb.

TABLE OF CONTENTS.

	Page
Petition for Rehearing	1–7
Exhibit "A"	7–16
Exhibit "B"	17–19
Exhibit "C"	20–21
Brief in Support of Petition	23–37

CASES CITED.

	Page
Lincoln Gas & E. L. Co. v. City of Lincoln, 250 U. S. 256	24, 29
Wilcox v. Consol. Gas Co., 212 U. S. 19	28
Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 430	28
Missouri Rate Cases, 230 U. S. 474	29
Missouri v. C., B. & Q. R. R. Co., 241 U. S. 533	29, 37
Minneapolis, St. P. & Ste. M. Ry. Co. v. C. L. Merrick Co., 254 U. S. 376	29

No. 29 Original.

IN THE

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OF THE

UNITED STATES

October Term 1920.

EX PARTE IN RE LINCOLN GAS AND ELECTRIC LIGHT COMPANY, A CORPORATION, PETITIONER.

PETITION AND MOTION FOR REHEARING.

To the Honorable William Howard Taft, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now Lincoln Gas and Electric Light Company, a corporation, by its attorneys, and having first obtained leave of this honorable court so to do, presents this, its petition and motion for a rehearing in the above entitled cause.

Your petitioner respectfully shows unto this honorable court that in the proceedings herein it contended among other things, that the court below is without jurisdiction to compel the petitioner to refund to consumers of gas the amounts collected by it in excess of the One Dollar ordinance gas rate, originally complained of by petitioner, from and after the final decree was rendered by the court below, on the 23rd day of September, 1915. This contention of the petitioner was by the opinion and decision of this honorable court denied for two reasons:

(1) Because it was assumed by the court that no suit had been instituted by the petitioner attacking the rate ordinance as non-compensatory since the final decree was rendered by the court below on the 23rd day of September, 1915, declaring the rate ordinance to be valid and binding as to the rates fixed therein, and

(2) Because the bond given by petitioner in its appeal from the decree of the court below in terms provided for the repayment of all sums collected in excess of the rates fixed by the ordinance during the period the injunction should remain in effect, provided the decree of the court below should be sustained by this honorable court.

Your petitioner respectfully represents and shows unto this honorable court that in making the findings herein complained of it has overlooked or has been unaware of certain material facts which your petitioner hereby more specifically calls to the attention of the court in support of its application for rehearing.

(a) Your petitioner respectfully shows that pursuant to permission granted by this honorable court in the mandate following the opinion in 250 U. S. 256, your petitioner did forthwith file in the court below its petition in a new suit wherein it again attacked the rate ordinance complained of as being non-compensatory and confiscatory in character; that the defendant City of Lincoln, objected to the institution of such suit and the filing of said petition until after the mandate of this honorable court should actually be spread upon the records of the court below; that after the spreading of said mandate upon the records said petition was refiled; that said petition attacked the rate ordinance as being non-compensatory and confiscatory in character from and after the date of the final decree rendered by the court below on the 23rd day of September, 1915, and prayed injunctive relief against the defendant City of Lincoln, from in any way enforcing any of the

provisions of said ordinance from and after said 23rd day of September, 1915; that after the filing of said petition and after counsel had been heard thereon, and after the same had been duly considered by the court, an injunction was granted, as prayed, and the defendant City of Lincoln was enjoined from in any way enforcing any of the provisions of said ordinance; that said injunction is still in full force and effect, except as to certain modifications made thereto by Judges Carland and Woodrough, whereby petitioner was permitted to charge an increased rate for gas over and above that named in the original injunction; that the suit in which said injunction was rendered is still pending in the court below, and that until final disposition thereof the injunction granted therein is binding upon the defendant and prohibits it and consumers of gas from collecting any sums charged by your petitioner in excess of the ordinance rate, from and after the 23rd day of September, 1915. Certified copies of said petition, the order and injunction issued thereon and the injunction bond given thereunder are hereto attached, and marked "Exhibits A," "B" and "C" respectively.

(b) Your petitioner further respectfully shows that this honorable court in the rendition of its opinion herein overlooked the fact that the City of Lincoln was without power or authority to collect any overcharges alleged to be due from and after the 23rd day of September, 1915, by reason of the injunction issued by the court below in the proceedings above called to the attention of this honorable court, and that the court below was without authority to order the refund of such alleged over-charges by reason of its own injunction setting aside the rate provisions of said ordinance and prohibiting the enforcement thereof.

(c) Your petitioner further shows unto this honorable court that pending the appeal resulting in the decision in 250 U. S. 256, your petitioner did on two separate occasions, present its petitions to this honorable court, and prayed leave

to be heard thereon and to show changed conditions and increased cost of operation and the non-compensatory and confiscatory character of the ordinance complained of, due to conditions brought about by the World War, and that notwithstanding the City of Lincoln and the consumers of gas had due notice and knowledge of such changed conditions and of the presentation of such petitions, your petitioner was denied the privilege of being heard upon said petitions, and the right to show the changed conditions and the resulting confiscatory character of the ordinance, as therein alleged.

(d) Your petitioner further respectfully shows unto this honorable court that in the rendition of its decision herein it has overlooked the fact that the ordinance complained of was duly enjoined by the court below, pending and until the decision of this honorable court in 250 U. S. 256, and that the court below would not have considered a petition whereby it was sought to enjoin the enforcement of an ordinance which had already been set aside and enjoined by that court.

(e) Your petitioner further represents that in holding that the bond given by your petitioner requires it to refund all over-charges collected in excess of the ordinance rate, this honorable court has overlooked the fact that the ordinance rate was enjoined by the court below in the proceedings instituted under the "without prejudice" clause of this court's opinion and mandate; that in effect there is no ordinance rate, and that the provisions of the bond apply only to over-charges collected in excess of the ordinance rate which has been enjoined.

(f) Your petitioner respectfully shows that this honorable court overlooked the further facts that the court's mandate commanded that "such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had"; and that manifestly "right and justice" should not require that your petitioner be com-

pelled to refund alleged over-charges in excess of the ordinance rate, which has been and still is enjoined; and when as matter of fact, there is no ordinance rate in effect; and when as shown by the records in the case, such refunds would be greatly in excess of the total appraised value of your petitioner's property; and when no dividends have been paid by your petitioner since the 23rd day of September, 1915, and the total income received by it has been necessarily expended in maintaining its property and in providing adequate service for its consumers; and when the petitioner has exhausted every remedy at its command to establish the confiscatory character of the ordinance complained of, and to avoid the ruinous consequences necessarily attendant upon its compliance therewith.

(g) Your petitioner further represents that the conditions of the bond are unjust and unconscionable, and that the petitioner should not have been required to agree to the terms and provisions thereof, in order that it might have the judgment and decision of the court below reviewed by this honorable court; and that right and justice do not require compliance with the provisions thereof under all the facts and circumstances before this honorable court.

(h) Your petitioner respectfully shows that inasmuch as the over-charges which the petitioner will be required to pay unless the opinion of this honorable court is set aside or modified, greatly exceeds the amount of the bond, and that inasmuch as your petitioner would be individually liable at law for such excess over-charges the action of the defendant in entering the orders complained of should not be sustained upon the ground that the bond provides for a refund of all over-charges collected in excess of the ordinance rate, as the full extent of your petitioner's responsibility for over-charges is not fixed by the bond.

Your petitioner further states that it has at all times been diligent in the prosecution of its appeal from the judgment

and decision of the lower court rendered on the 23rd day of September, 1915; that upon its application said cause was advanced upon the docket of this honorable court; that it was in no way responsible for unavoidable delays attendant upon its appeal, and that it should not be penalized to the extent of having its entire property confiscated and destroyed, when it was powerless to further contest the rate provisions of the ordinance complained of, and when that ordinance compelled it to furnish gas to its customers during the period of greatest inflated values in the world's history, for a price which was not adequate before the beginning of the World War, and which fell far short of paying ordinary operating expenses during the period between September 23, 1915, and January, 1920.

Your petitioner believes that no prior adjudication of this honorable court has gone thus far, and that the full effect of the decision of this court was not brought fully to its attention before the rendition of its opinion.

WHEREFORE, your petitioner prays that it may be granted a rehearing herein, and that the respondent be ordered to revoke and set aside that portion of the orders complained of dealing with over-charges subsequent to the final decree of September 23, 1915, or that the judgment and opinion of this court be so modified as to order the respondent to hear the evidence and to determine therefrom whether the rates prescribed in the ordinance complained of were non-compensatory and confiscatory subsequent to the 23rd day of September, 1915; and that the respondent be required to determine from such evidence what amount, if any, should be refunded by your petitioner; or that the proceedings complained of be abated until final decision in the new action instituted in the court below by your petitioner, wherein said rate ordinance was enjoined; and that such further proceedings be had as will permit the petitioner to show changed conditions and costs of operation from and after September 23, 1915, and

that it be required to make only such restitution, if any, as right and justice may demand.

LINCOLN GAS AND ELECTRIC LIGHT COMPANY,
Petitioner.

By R. A. BROWN, of St. Joseph, Mo.,
MAXWELL V. BEGHTOL, of Lincoln, Neb.,
Attorneys for Petitioner.

CHARLES A. FRUEAUFF, of New York City,
WADE H. ELLIS, of Washington,
Of Counsel.

Maxwell V. Beghtol, one of the attorneys for the petitioner, hereby certifies that the above petition for rehearing is well founded and is not interposed for delay. Counsel further certifies that the matters of fact alleged in said petition and motion are true, that the suit therein referred to was instituted and the injunctive order therein set out was duly granted, became of force and still remains in full force and effect, except as modified as appears in said petition and motion.

MAXWELL V. BEGHTOL.

EXHIBIT A.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

PETITION IN EQUITY.

121 Equity.

Lincoln Gas and Electric Light Company, a Corporation, *Plaintiff.*

vs.

The City of Lincoln, a municipal corporation, and John E. Miller, William Schroeder, George Dayton, John Wright, and T. J. Hensley, Commissioners. *Defendants.*

The plaintiff complains of the defendants and alleges and says:

1. That the plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Nebraska with its place of business in the city of Lincoln, Nebraska; that the defendant, the City of Lincoln, is a municipal corporation, existing under and by virtue of the laws of the State of Nebraska as a city of the first class, having more than 40,000 and less than 100,000 inhabitants; that the defendants, John E. Miller, William Schroeder, George Dayton, John Wright, and T. J. Hensley are the duly elected and acting council of said City of Lincoln, and as such officers are charged with the duty of making and enforcing ordinances of said city.

2. That the amount in controversy exceeds Three Thousand Dollars ($3,000), exclusive of interest and cost, and the acts of the defendants herein complained of constitute a violation of the Constitution of the United States, and particularly Section 10, Article 1, prohibiting any State from passing a law impairing the obligation of a contract, and Article 5, of the amendments of the Constitution of the United States, providing that no person shall be deprived of its property without due process of law, nor shall the private property of any person be taken for public use without just compensation; and Article 14, of the amendments of the Constitution of the United States, guaranteeing to all persons within the jurisdiction of the United States equal protection of the laws. That the matter complained of by the plaintiff as hereinafter set out constitute a violation of said constitutional guaranties and provisions.

3. Plaintiff says that in the year of 1901, it was organized as a corporation under and by virtue of the laws of the State of Nebraska, and in said year it acquired the property and franchise of its predecessor, the Lincoln Gas Company, granting to the plaintiff in perpetuity the right (a) to own, operate, and maintain in the City of Lincoln a gas plant and works, and to manufacture artificial gas in said City of

Lincoln for heat, light and power purposes; (b) to own, operate, construct, and maintain in the streets and public grounds of the City of Lincoln gas mains and appliances for the sale and distribution of gas throughout the said City; (c) to manufacture, sell and distribute throughout said City of Lincoln to the citizens and residents thereof artificial gas for heat, light and power purposes, during the life of said franchise.

Plaintiff says that by reason of investing its funds in such plant and distribution system under said franchise, it acquired the franchise right from the City of Lincoln to charge a fair and reasonable price for the service to be rendered under said franchise, and a sufficient rate for such gas to yield a fair rate of return upon the value of the property employed in such service.

4. Plaintiff says that on or about November 12, 1906, the Mayor and Council of the City of Lincoln passed the following ordinance:

"An ordinance regulating the price of manufactured gas, establishing penalties for the violation of the provisions of this ordinance and repealing all ordinances in conflict herewith.

"*Be it ordained by the Mayor and Council of the City of Lincoln:*

"Section 1. No gas company shall charge, exact, demand or collect from any consumer for gas manufactured or sold in the City of Lincoln for illuminating or heating purposes more than the sum of one dollar net per one thousand cubic feet, provided that any gas company may add a penalty of not more than ten cents per thousand cubic feet for non-payment after six days from the date said gas company has furnished a bill or statement to any consumer; and provided further that a minimum monthly charge of twenty-five cents a month for a single service may be collected.

"Section 2. The provisions of this ordinance shall apply to all companies which manufacture or distribute

gas for sale for illuminating or heating purposes and the term 'gas company' shall include all persons, firms, corporations or individuals who manufacture or sell gas for illuminating or heating purposes.

"Section 3. Any gas company, and any executive officer, president or manager of any gas company who shall violate any provision of this ordinance shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not less than Ten Dollars nor more than One Hundred Dollars and a violation hereof for each calendar day or part thereof shall constitute a separate offense.

"Section 4. All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

"Section 5. This ordinance shall take effect and be in force from and after December 1, 1906, after its passage, approval and publication, according to law."

Plaintiff says that the above ordinance has not been modified or repealed by the City of Lincoln and by the terms thereof, this plaintiff at all times since December 1, 1906, has been required and is now required to furnish gas in the City of Lincoln at the rate of One Dollar per thousand cubic feet.

Plaintiff says that in December, 1906, it instituted an action in this court to enjoin the enforcement of said ordinance alleging that the rate prescribed by said ordinance was not compensatory, and would result in denying to the plaintiff rights guaranteed to it under the Federal Constitution; that upon the presentation of the petition in said case and upon the application of this plaintiff, an order of injunction was issued by this court enjoining the City of Lincoln from enforcing said Dollar rate, pending the final determination of said case on condition this plaintiff would furnish a good and sufficient bond on the terms and conditions prescribed by the court, which bond this plaintiff furnished in the form and manner required and said bond was approved by the court, whereupon, said order of injunction became effective. That

thereafter the court appointed Honorable J. J. Sullivan of Omaha as Special Master to hear and report the testimony to the court together with his findings of fact and conclusion of law; that said Special Master heard the testimony of the plaintiff and defendant in said action as to the value of the property employed by the plaintiff in the manufacturing and distributing of gas in the City of Lincoln, and the cost of the manufacture and distribution of gas in the City of Lincoln for the years of 1907 to 1912, inclusive, ending such inquiry or examination as to the value of such property and the cost of the manufacture and distribution of gas as of January 1, 1913, and including the years of 1907 to 1912, inclusive, as aforesaid. That no evidence was taken by said Special Master and no findings made as to the value of the property or the cost of the manufacturing and distributing of gas in the City of Lincoln after the close of the year of 1912; that said Special Master made and reported the evidence, together with his findings of fact, and conclusions of law to this court, the Honorable Page Morris, Judge, presiding, and said report and said findings of said Special Master were approved by this court, and judgment entered on September 23, 1915, sustaining the validity of said Dollar gas ordinance, whereupon this plaintiff appealed to the Supreme Court of the United States, and such proceedings were had therein that on June 2, 1919, the order and judgment of this court were modified to the extent and in the particular that said judgment should be without prejudice to the right of this plaintiff to commence a new action to determine the adequacy of the rate under said ordinance after the date of said decree of September 23, 1915.

6. Plaintiff says that there has been a constant increase in the cost of labor and material entering into the manufacture and distribution of gas since the opening of the world war in 1914. That coke used in the manufacture of gas cost this plaintiff $6.90 per ton in 1913, while the price was more than $12.50 per ton for 1917, 1918 and 1919; that labor cost entering into the manufacture and distribution of gas during said

period increased approximately one hundred per cent. That the operating cost per thousand cubic feet of gas, exclusive of any return on the present value, or investment in the properties and exclusive of depreciation, and exclusive of an allowance to cover the occupation tax of 3 per cent on the gross receipts resulting from sales of gas in the City of Lincoln levied by said City was for the year 1913 .8082 cents per M cubic feet of gas sold in the said City of Lincoln, and for the year of 1918 and for 1919 up to November 1, 1919, was more than 1.088; that the actual and necessary operating expense and cost of the manufacture and distribution of gas for the years of 1918 and 1919 has been more than One Dollar per thousand cubic feet, without any return whatever on the investment in the property employed by this plaintiff in the manufacture, distribution and sale of gas in the City of Lincoln.

Plaintiff says that in 1918 that it manufactured and sold in the City of Lincoln 262,441 M cubic feet of gas and that the actual operating expense incurred by plaintiff in the manufacturing and distributing of said gas, exclusive of any depreciation and exclusive of any return upon the investment in the properties employed therein, was the sum of $285,541.54; that the Dollar rate provided in said ordinance would not have produced enough revenue by more than $23,000 to have paid the necessary operating expense, exclusive of any return upon the investment in the properties, and exclusive of any depreciation.

That the gas sales up to the end of October 31, 1919, were 230,962.2 M cubic feet of gas, and that the actual operating expense incurred by plaintiff in the manufacture and distribution of said gas, exclusive of any depreciation and exclusive return upon the investment in the properties employed therein was the sum of $244,788.68; that the Dollar rate provided in said ordinance would not have produced enough revenue by more than $13,000 for said period, exclusive of any depreciа-

tion and exclusive of any return upon the investment in the properties.

Plaintiff says that in the years of 1918 and 1919, the actual value of the properties employed in the manufacture and sale of gas in the City of Lincoln was more than $1,500,000.00.

Plaintiff says that taking the whole period from December, 1906, to this date, the said ordinance rate is not compensatory and would not yield a fair rate of return on the value of the properties employed in such service or on the investment therein; that the earnings for the years of 1906 to September 23, 1915, over and above operating expenses are more than overcome, or absorbed in the deficit in such earnings in the years subsequent to September 23, 1915.

Plaintiff says that since September 23, 1915, the rate of One Dollar per thousand cubic feet of gas as provided in said ordinance would not have been sufficient to pay the necessary operating expenses, and a fair rate of return on the value of the properties employed in such service or in the investment therein. That said ordinance rate during said period is inadequate and confiscatory and said ordinance by reason thereof is invalid and void.

Plaintiff says that in equity and good conscience, the losses and gains over and above the necessary operating expense in the manufacture and sale of gas in the City of Lincoln for the period beginning December, 1906, to date, should be treated as a whole, and the gains in said period applied to meet the losses in such earnings during said period and that an account should be taken of the whole of said period and that this plaintiff should not be required to refund excess payments over and above One Dollar per thousand cubic feet for the period from December, 1906, to September 23, 1915, and suffer the loss or deficit during the period following September 23, 1915, that the loss or shortage in the one period should be offset against the gains or surplus, if any, in the other period,

and that in this proceeding an account should be taken of the whole period from December, 1906, and payments or refunds for the period from December, 1906, to September 23, 1915, should be stayed and held in abeyance by order of court herein until such account shall be taken.

Plaintiff says that the enforcement of the Dollar Gas Ordinance above referred to would result in the confiscation of plaintiff's property and failure to observe said ordinance would result in repeated and continuous prosecution of the plaintiff and the imposition of fines and penalties. Plaintiff says that it has no adequate remedy at law in the premises and will suffer irreparable injury and damage unless the court enjoin the enforcement of said ordinance in this proceeding.

WHEREFORE plaintiff prays,

1. That process may issue and be served upon the defendants and each of them, require them to appear and make answer hereto.

2. That a temporary injunction be issued herein in enjoining the defendants from enforcing the provisions of the ordinance of November 12th, 1906, requiring this plaintiff to furnish gas at the rate of $1.00 per thousand cubic feet and that upon the judgment and decree of the court herein a perpetual injunction shall issue perpetually enjoining the enforcement of said ordinance.

3. That a decree and judgment of this court may be entered herein decreeing said ordinance of November 12th, 1906, and has been void from and after September 23rd, 1915, and in violation of the Constitution of the United States as set forth in this petition.

4. That an accounting be had in this proceeding of the amount charged by the plaintiff over and above the dollar rate

provided in said ordinance of November 12th, 1906, for the period from December 1, 1906, to September 23rd, 1915, and that an account be taken of the earnings of the plaintiff company subsequent to December 23rd, 1915, at the dollar rate prescribed in said ordinance and that the deficit in such earnings during such period be made good out of the earnings of the period from December 1st, 1906, to September 23rd, 1915, and applied upon such deficit to the end that the plaintiff may not be required to refund payments in excess of one dollar for the period from December 1st, 1906, to September 23rd, 1915, and suffer the loss for the period of September 23rd, 1915, to date resulting from furnishing gas to the consumers at the rate prescribed by said ordinance and at a rate that did not yield a fair rate of return over and above the operating costs for said period and that the payments of the refunds for the period from December 1st, 1906, to September 23rd, 1915, under the order of this court may be stayed and held in abeyance until such accounting may be had herein.

5. Plaintiff further prays for such other and further relief as in equity that plaintiff may be entitled to in the premises.

LINCOLN GAS AND ELECTRIC LIGHT COMPANY,
By E. C. STRODE,
Its Attorney.

Solicitor:
C. A. FRUEAUFF.

STATE OF NEBRASKA, }
} ss.
COUNTY OF LANCASTER, }

J. E. Harsh being first duly sworn on oath says that he is General Manager of the plaintiff and as such Manager has general charge of the books and records of plaintiff and general charge and supervision of the manufacture and distribution of gas by the plaintiff in the City of Lincoln; that he has read over the foregoing petition and knows the contents thereof that the matters and facts therein stated are true.

J. E. HARSH.

Endorsed: Filed in Lincoln Division
Dec. 1, 1919
R. C. HOYT, *Clerk*,
By J. H. MCCLAY, *Deputy*.

Subscribed in my presence and sworn to before me this 1st day of December, 1919. J. B. STRODE,
[NOTARIAL SEAL] *Notary Public*.

Endorsed: Refiled in Lincoln Division
Jan. 5, 1921
R. C. HOYT, *Clerk*,
By J. H. MCCLAY, *Deputy*.

UNITED STATES OF AMERICA, }
DISTRICT OF NEBRASKA, } ss.
LINCOLN DIVISION. }

I, R. C. Hoyt, Clerk of the District Court of the United States, for the District of Nebraska, here certify that the foregoing is a full, true and faithful copy of Petition in Equity in the matter of Lincoln Gas and Electric Light Company versus The City of Lincoln, et al., No. 121 Equity, together with all endorsements thereon, as the same appears in the files of the office of the Clerk of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand as Clerk aforesaid, and caused an impression of the seal of said Court to be hereunto affixed at the City of Lincoln, within said District and Division, this 21st day of June, A. D. 1921.

R. C. HOYT, *Clerk as aforesaid*,
[SEAL] By J. H. MCCLAY, *Deputy Clerk*.

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

No. 121 Equity.

LINCOLN GAS AND ELECTRIC LIGHT COMPANY, A CORPORATION,

Plaintiff.

v.

CITY OF LINCOLN, ET AL.,

Defendants.

A new petition being filed alleging that under existing conditions, the Ordinance rate is clearly confiscatory and asking that a restraining order be issued, it is proper for the Court to say that it is a matter of common knowledge recognized in the opinion of the Supreme Court in the previous case, that the costs of the production of gas and other public utilities has so much increased on account of war conditions which still unfortunately continue, that it is impossible to produce gas for anything near the amount for which it could have been produced at the time of the passage of the Ordinance herein. Under the Constitution of the United States, the plaintiff has the right to be protected against any rate which does not pay the costs of production and a reasonable profit therefor. As things now stand there can be no dispute that the order herein should be granted. I am fixing a bond of only $10,000 in the hope and in the expectation that the proper authorities will now be able to arrive at a determination of a rate which during existing conditions will be constitutional and just. The people will understand that the right to fix rates is a continuing one and that as circumstances may justify the City Council has the power to readjust any rate now fixed, and the Court expresses the hope that pending these extraordinary conditions further litigation will be avoided.

ORDER.

Now, on this fifth day of January, 1920, the petition herein being presented to the Court, upon the application of the

plaintiff for temporary restraining order and the defendants appearing and objecting to the consideration of such application for the reason that the said case was commenced before the decree in this court upon the mandate of the Supreme Court, and such objections being now submitted, the Court holds that to avoid any possibile question and without the determination of any question, and without prejudice to the rights of either party as to any question involved in such petition, such petition may be refiled as of date after the entry of decree herein and that the same will then be considered.

And now on this sixth day of January, 1920, the petition having been refiled as aforesaid, and the court being now fully advised, it is now determined and adjudged that a temporary restraining order issue restraining the defendants, their officers, agents or employes from enforcing Ordinance No. 432 of the City of Lincoln, Nebraska, regulating the price of manufactured gas and fixing the price for all manufactured sold within said city at $1.00 per thousand cubic feet, and other conditions until further orders of the Court herein, and this restraining order shall be binding not only upon the defendants but upon all persons having notice thereof.

This restraining order is issued upon the following conditions:

(1) The plaintiff shall file bond in the sum of $10,000 conditioned that it shall repay to all consumers of gas the difference between the amount paid by them pending the continuance of this order and the amount which it is ultimately determined is a fair, reasonable, just and non-confiscatory rate, together with legal interest thereon, such question to be determined by this court, jurisdiction to determine the same being hereby reserved. The Court furthermore retains jurisdiction to hear and determine all questions arising herein upon any application, may increase the bond, or change its conditions, and make such other and further orders as may protect the rights of all parties.

Either party hereto may apply for an order fixing the time for a hearing upon the application for temporary injunction by giving three days' notice to the other side.

(2) Pending final hearing herein and while this order is in force, the plaintiff shall not charge consumers in excess of $1.40 per thousand cubic feet, upon the usual conditions heretofore fixed with reference to time of payment and terms of payment.

MARTIN J. WADE,
Judge.

Endorsed: Filed in Lincoln Division
Jan. 6, 1920
R. C. HOYT, *Clerk*,
By J. H. MCCLAY, *Deputy.*

UNITED STATES OF AMERICA, }
DISTRICT OF NEBRASKA, } ss.
LINCOLN DIVISION. }

I, R. C. Hoyt, Clerk of the United States District Court, District of Nebraska, here certify that the foregoing is a full, true and faithful copy of an ORDER, made by Honorable Martin J. Wade, Judge, and entered on the 6th day of January, 1920, as the same appears of record in the office of the Clerk of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand as clerk aforesaid, and caused an impression of the seal of said Court to be hereunto affixed at the City of Lincoln within said District and Division, this 20th day of June, A. D. 1921.

R. C. HOYT, *Clerk as aforesaid,*
By J. H. MCCLAY, *Deputy Clerk.*

[SEAL]

EXHIBIT C.

BOND.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

LINCOLN GAS AND ELERTRIC LIGHT COMPANY, A CORPORATION,

Plaintiff.

v.

CITY OF LINCOLN, ET AL.,

Defendants.

Whereas the plaintiff in the above entitled action secured a restraining order on January 5, 1920, restraining and enjoining the enforcement of Ordinance No. 432 passed by the City Council of Lincoln, Nebraska, November 12, 1906, approved by the Mayor of said City November 19, 1906, establishing the rate to be charged for gas in the City of Lincoln at One Dollar per thousand cubic feet, etc., upon condition that the plaintiff should furnish a good and sufficient bond in the sum of $10,000.00, conditioned as provided in said restraining order.

Now, therefore, the Lincoln Gas and Electric Light Company as principal and U. S. Fidelity & Guaranty Co., of Baltimore, Md., as surety hereby obligate themselves in the penal sum of $10,000.00 to pay or repay all consumers of gas in the City of Lincoln the difference between the amount paid by them pending the continuation of said restraining order, and the amount which it shall ultimately be determined to be a fair, reasonable, just and non-confiscatory rate, together with legal interest thereon, such question to be determined by the above court and on account of which jurisdiction is expressly reserved, otherwise said obligation to be and remain in full force and effect.

LINCOLN GAS AND ELECTRIC LIGHT COMPANY,

By J. E. HARSH, *Vice Pres.*,

[CORPORATE SEAL] and By E. C. STRODE, *Its Attorney.*

THE UNITED STATES FIDELITY & GUARANTY CO.

By O. W. PALM, *Attorney in Fact.*

[CORPORATE SEAL]

Dated this 7th day of January, 1920.
Approved—MARTIN J. WADE,
Jan. 10, 1920. *U. S. District Judge.*
Endorsed: Filed in Lincoln Division
Jan. 12, 1920
R. C. HOYT, *Clerk*,
By J. H. MCCLAY, *Deputy.*

UNITED STATES OF AMERICA, }
DISTRICT OF NEBRASKA, } ss.
LINCOLN DIVISION. }

I, R. C. Hoyt, Clerk of the District Court of the United States, in the District of Nebraska, here certify that the foregoing is a full, true and faithful copy of a BOND, executed by Lincoln Gas and Electric Light Company and U. S. Fidelity & Guaranty Co., of Baltimore, Md., and approval thereof, together with all endorsements thereon, in the matter of Lincoln Gas and Electric Light Company versus The City of Lincoln, et al., as the same appears in the files in the office of the Clerk of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand as clerk aforesaid, and caused an impression of the seal of said Court to be hereunto affixed at the City of Lincoln within said District and Division this 21st day of June, A. D. 1921.

R. C. HOYT, *Clerk as aforesaid,*
[SEAL] By J. H. MCCLAY, *Deputy Clerk.*

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1920.

No. 29, Original.

EX PARTE IN RE LINCOLN GAS AND ELECTRIC LIGHT COMPANY, A CORPORATION, PETITIONER.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

May It Please the Court:

In denying the relief prayed for by your petitioner in its application for writ of mandamus with particular respect to the requirement of payment without further hearing, of amounts collected since September 23, 1915, this honorable court has assigned among others the following reasons therefor:

First: That no suit had been instituted by the petitioner to maintain its contention that the ordinance rate complained of had through changed conditions become non-compensatory since the final decree of the court below on the Twenty-third day of September, 1915; and

Second: Because the bond given by petitioner in its appeal from the decree of the court below in terms provided for the repayment of all sums collected in excess of the ordinance rate, should the petitioner fail in its appeal.

While other grounds were assigned by the court for its action in denying the mandamus relief prayed for, the petitioner will, in support of its petition for a rehearing, consider only the two grounds assigned by the court, as above set out; and they will be noticed in the order of their assignment:

First: In declaring the petitioner to be without remedy, since it had failed to institute a new proceeding to test the validity of the rate ordinance subsequent to September 23, 1915, by reason of changed conditions, the court says:

> "Nor is there substance in the contention that the jurisdiction does not extend to overcharges subsequent to September 23, 1915. The thought suggested is, that the adjudication of the validity of the ordinance did not extend beyond the date of the final decree; that thereafter changed conditions, increased costs, and other circumstances referred to by us in 250 U. S. 268, may have rendered the limited rate non-compensatory, and the ordinance therefore confiscatory; and that at least the company, before being called upon to make restitution, ought to have a hearing upon this question as to the period subsequent to September 23, 1915. The contention overlooks the effect of the ordinance, which is presumptively valid, and has continuing force unless and until set aside by judicial decree as the result of an investigation, in which the burden of proof is upon the company; that the decree of September 23, 1915, is conclusive evidence that the company has made such an attempt, and has failed, and that the ordinance rate not only is lawful and binding, but will so continue unless and until the company, under the 'without prejudice' clause, shall begin a new suit and maintain its contention that the rate through changed conditions has become non-compensatory. See *Missouri* v. *Chicago, Burlington and Quincy R. R.*, 241 U. S. 533, 539. The contention also overlooks the fact that the bond itself was given subsequent to the decree appealed from, in terms for the benefit not only of gas consumers who theretofore had purchased gas from the company, but of those who should purchase thereafter at any time before the final determination of the suit. The specific obligation thus assumed requires it to refund all over-charges

collected in excess of the ordinance rate, so long as it had the benefit of the injunction pending the appeal; and the jurisdiction of the District Court to see that the excess charges are refunded has corresponding extent."

We confess our inability to satisfy ourselves as to the full meaning of the language used by the court. If it is meant that after final decree in the court below on September 23, 1915, the petitioner should have instituted a new suit to test the validity of the gas ordinance as soon as conditions changed to such an extent as to render the ordinance rate non-compensatory, and while the petitioner's appeal from the decree of the court below was pending in this court, our answer must be that in view of the fact that the court below had dismissed the petitioner's bill without reservation or qualification, the petitioner believed itself to be without power to institute another suit again attacking the validity of the ordinance for reasons which the lower court had found to be insufficient.

Again, it was thought that inasmuch as the petitioner was by proper appellate proceedings seeking to have the decree of the court below reviewed by this court, and inasmuch as the temporary injunction granted by the court below had been maintained in full force and effect by reason of the appeal bond given by the petitioner, that it would have been futile to again go before the court below and seek to enjoin the enforcement of the ordinance, when the court's previous injunction was yet in full force and effect.

It would seem that this honorable court must have entertained views similar to those expressed above, for in its opinion in 250 U. S. 256, affirming the decree of the court below, it ordered the decree to be so modified "as to permit complainant to make another application to the court for relief against the operation of the ordinance hereafter, if it can be shown as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation and the current rates of return upon capital as they

stand at the time of bringing suit or likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions," and that the petitioner's bill be dismissed without prejudice.

Clearly the "without prejudice" clause of the court's opinion is not without meaning, and was not inserted without some definite purpose.

As the decree of the court below was "without reservation or qualification," this court evidently believed that petitioner was thereby foreclosed from bringing another action to test the validity of the same ordinance, unless the decree should be modified. If this be true, then the petitioner was bound by the decree below, and was not free to institute another suit until it was unshackled by the "without prejudice" clause of this court's opinion. That opinion relates back to September 23, 1915, and modifies the final decree of the court below entered on that date.

It would seem that if the petitioner had the right to institute a new proceeding to again test the validity of the rate ordinance, pending its appeal to this court, it would undoubtedly follow that it would have had the right to institute a new proceeding to again test the validity of the ordinance, under the decision of this court in 250 U. S. 256, even though this court had in no wise modified the decree of the court below by inserting the "without prejudice" clause, as under such circumstances the decree of this court would have added nothing to, nor would it have taken anything from the decree of the court below.

If, therefore, it was necessary to modify the decree of the court below by adding the "without prejudice" clause, in order to give the petitioner the right to thereafter institute another suit attacking the rate ordinance, it necessarily follows that pending the appeal, and while the decree below was "without reservation or qualification," the petitioner was powerless to

proceed further in its attack upon the ordinance until after final decree by this court.

If it was intended that the "without prejudice" clause of the court's opinion should relate back to the date of the entry of final decree in the court below, and that the petitioner should not be penalized by the confiscation of its entire property without further hearing, should the decree of the court below be affirmed, then the petitioner respectfully shows to the court that immediately upon the filing of the mandate of this court in the court below, the petitioner on January 6, 1920, filed in the District Court below its petition in equity, a copy of which is attached to petitioner's motion for rehearing, alleging among other things that the same dollar gas ordinance which had been declared valid by the court in its final decree did not produce sufficient revenue to pay the cost of the manufacture and distribution of gas; that petitioners return had not been sufficient to pay its ordinary operating expenses at any time since September 23, 1915, and that the ordinance rate was and had been non-compensatory and confiscatory of petitioner's property; and the petitioner prayed that the provisions of the ordinance be enjoined from and after the 23rd day of September, 1915.

Upon the filing of the petition the City of Lincoln objected to any action being taken thereon until the mandate of this court should be actually spread upon the records of the court below, the contention of the City of Lincoln being that the court below was without authority to entertain a new action to again test the validity of the ordinance until after the mandate of this court had been actually spread upon the records of the court below. The petition was therefore refiled; and the court having been fully advised with respect thereto, entered an order restraining the City of Lincoln from enforcing the provisions of the ordinance, as prayed in the petition. The injunction thus granted has since been and yet is in full force and effect.

When all the facts are before the court, and when it is considered that the petitioner promptly instituted the action permitted by this court in the "without prejudice" clause of its opinion, and that it fully carried the burden of showing the non-compensatory character of the ordinance, we believe the court will not then say that the petitioner should sooner have commenced a new action to again test the validity of the gas ordinance, when it was without power or authority so to do. When the court said,

> "The ordinance rate not only is lawful and binding, but will so continue unless and until the company under the without prejudice clause shall begin a new suit and maintain its contention that the rate through changed conditions has become non-compensatory,"

it did not have before it all the facts. The company did begin a new suit, just as soon as it was free to do so, and did maintain its contention that the rate had become non-compensatory; and it secured from the respondent himself a judicial finding to that effect. Nevertheless, the respondent is assuming jurisdiction to require the petitioner to pay consumers for alleged overcharges during a period when the ordinance was not in force, by reason of the appeal bond which kept alive the original injunction granted, and while there is in full force and effect a new injunction preventing the officers of the city from attempting to carry out the provisions of the ordinance from and after September 23, 1915.

This court has repeatedly explained the effect of affirming a rate case "without prejudice." That phrase has been held to mean that the decree shall not operate to the prejudice of either party, either for or against the enforcement of the rate, in so far as matters subsequent to the decree are concerned.

Wilcox v. *Consolidatd Gas Company*, 212 U. S. 19.

Northern Pacific Rwy. v. *North Dakota*, 216 U. S. 579.

Louisville v. *Cumberland Telephone and Telegraph Company*, 225 U. S. 430.

Missouri Rate Cases, 230 U. S. 474.

Des Moines Gas Company v. *Des Moines*, 238 U. S. 153.

Missouri v. *Chicago, Burlington and Quincy Railroad Company*, 241 U. S. 533.

Minneapolis, St. Paul and Sault Ste. Marie Rwy. Company v. *C. L. Merrick Company*, 254 U. S. 376.

We do not claim that there is now an open question concerning the validity of the ordinance up to September 23, 1915, the date of the decree below, but we do contend that the compensatory character of the ordinance subsequent to September 23, 1915, is open to adjudication by express leave of this court in its opinion in the original case. In that decision the court has said:

> "The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation, and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions. It is a matter of common knowledge, that owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."
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> *Lincoln Gas Company* v. *Lincoln*, 250 U. S. 256, 268.

We believe that the statement of the court to the effect that "The rate ordinance is confiscatory in its effect under the new

conditions" can refer only to conditions which are new as compared with conditions prior to the time of the original decree, to-wit, September 23, 1915. There is no logical reason for the selection of any other date after which the affirmance is without prejudice. If affirmance without prejudice means that it is without prejudice after the filing of the mandate, then there was a period between the original decree below and the final adjudication of the appeal in this court during which the operation of the Constitution of the United States was suspended and the petitioner was either deprived of its right of appeal or compelled to allow conditions in one period of time to control its revenues during another period of time when, as a matter of fact, the two periods were essentially different in character. The period prior to the decree of September 23, 1915, was practically unaffected by the World War, whereas, the period between 1915 and the filing of the mandate on December 24, 1919, covered four years of absolutely new and changed conditions during which prices of every conceivable commodity doubled and trebled, and the petitioner's operating expenses increased accordingly. It is therefore apparent that the "without prejudice" clause was not intended to operate only after the mandate was filed in the court below.

The appellant had a clear right of appeal but had, of course, no control over the length of time consumed by the appeal. The petitioner appealed promptly from the decree of September 23, 1915, and during the pendency of the appeal twice applied to this court with extensive showings for relief against the ordinance which had become confiscatory by reason of changed conditions since 1915. These appeals were denied. The case was argued in October, 1917, and was decided by the court in June, 1919. There was no method by which appellant could hasten the decision or shorten the time necessarily consumed by the deliberations of the court, and to say that it is to have no opportunity to show that the ordinance was not compensatory during a period when the case was under con-

sideration by the court is to deny to it that due process guaranteed by the Constitution.

The court could have had in mind in granting permission to file another suit, only that the petitioner could inquire into the compensatory character of the ordinance from September 23, 1915, to the present time. Any other suggestion would destroy the meaning of the words "without prejudice."

Irrespective of what might have been the intention of the court, the respondent himself considered that the petitioner was entitled to have a hearing on the compensatory character of the ordinance from Septembr 23, 1915, to the present time, because, upon the suit being filed in January, 1920, he immediately entered a restraining order against the enforcement of the ordinance and the injunction has ever since been in full force and effect. But, notwithstanding this suit and its adjudication, and notwithstanding the fact that the company has assumed and successfully carried the burden of showing that the ordinance is confiscatory under new and changed conditions subsequent to the original decree, the respondent, in the orders complained of in this case, assumes jurisdiction over the period subsequent to the decree in 1915, and directs the petitioner to refund all overcharges during that period of time.

We insist that by reason of the new injunction granted by respondent in January, 1920, the rate ordinance was set aside and enjoined, and that there has been no rate ordinance in effect from and after September 23, 1915, and that the respondent is without jurisdiction to enter the orders complained of in the mandamus proceedings, and to thereby set aside and nullify the injunction granted by him in January, 1920.

We are forced to the conclusion that by reason of our having failed to specifically call to the attention of this honorable court certain vital facts bearing upon petitioner's right to

the relief prayed for in its mandamus proceedings, the court has overlooked such facts.

It is a fact, as the court will doubtless recall, that the petitioner asked that its appeal from the judgment of the court below be advanced for hearing upon the docket of this court, and that at the same time it prayed leave to file a bill of review, or that it be permitted to file in the lower court a new proceeding wherein it might show changed conditions, and that the gas ordinance rate had become non-compensatory since the final decree in the court below on the 23rd day of September, 1915, and that it was by this court denied the right to file such bill of review or other new proceeding in the court below.

The court will further recall that the petitioner, on or about October 8, 1917, renewed its motion for leave to file its bill of review, or such other supplementary bill as might be proper to bring to the attention of the court changed conditions and increased cost of operation, and that the petitioner was again denied the right to institute such proceedings.

We believe that when the court is fully advised as to all the efforts made by the petitioner to avoid the ruinous consequences following its compliance with the gas rate ordinance, it will not permit the entire assets of the petitioner to be confiscated in paying overcharges, even though counsel for the petitioner may have failed to perform their full duty in presenting the facts which would more fully have enlightened the court. Unquestionably the court did not consider the fact that a new injunction had been granted after the opinion of the court in 250 U. S. 256, declaring the rate ordinance non-compensatory from and after September 23, 1915, and prohibiting the City of Lincoln from in any way enforcing the provisions thereof.

The court's attention is called to the fact that petitioner's appeal from the court below was promptly lodged in this

court, and that although the case was advanced upon the docket of this court for hearing, upon the application of the petitioner, it was not argued until October, 1917; that the decision of the court was not handed down until June, 1919; and that the mandate of the court was not spread upon the records of the court below until December 24, 1919. It will thus be seen that a delay of more than four (4) years elapsed between the entry of the final decree in the court below and the decision of this honorable court, and that during all that period prices of all commodities had so advanced as to render the rate ordinance not only non-compensatory, but absolutely confiscatory of petitioner's property, and that the petitioner was powerless to stay the hand of the destroyer.

The petitioner and its counsel do not wish to be understood as in any way criticising this honorable court for the delay attendant upon petitioner's appeal; it is fully realized that such delays are unavoidable. The petitioner does feel that the court has overlooked, or that its attention has not been directed to at least some of the facts and conditions above recited, and these matters are now more specifically called to the attention of the court, hoping that in the exercise of its equity prerogatives, and in order that right and justice may be done, it may yet review and set aside its former opinion in the mandamus case, and point the way whereby the petitioner may escape the ruin which confronts it, through no delay, default or neglect of its own.

Second: The petitioner further respectfully represents that this honorable court in holding that the appeal bond given by your petitioner requires it to refund all overcharges collected in excess of the ordinance rate, has overlooked the following material and controlling facts, or that counsel for petitioner have failed in their duty to more specifically call such facts to the attention of this court:

(a) In requiring the petitioner to make restitution of all overcharges, pursuant to the provisions of its appeal bond, the

court possibly did not consider all the facts in the light of its mandate, which required that "such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

The petitioner calls to the attention of the court the allegations contained in "Exhibit A," attached to its petition for rehearing, whereby it is shown that from the date of the entry of the final decree below, and until the presentation of petitioner's actual operating expenses were largely in excess of all sums it would have collected from its consumers under the dollar gas rate ordinance; that the rates actually charged by the petitioner after final decree below did not provide any sum in excess of operating expenses for return upon petitioner's property used and useful in the public service; and that it is entirely beyond the ability of the petitioner to make restitution as provided by the orders of the respondent, which have been sanctioned and approved by this honorable court. The petitioner states that proceedings to compel the doing of "right and justice" would not and could not sanction the taking and confiscation of petitioner's property, under the facts and circumstances called to the attention of this honorable court.

This proceeding has from its inception been pending in a court of equity, and it is the province of such courts to see that right and justice is done, and to prevent the unjust taking of property without due process, and in violation of the established rules of right thinking and right living.

(b) The court's attention is called to the fact that the words "right and justice" contained in the court's mandate, did not require, nor did they permit the court below to compel petitioner to be bound by the unjust and unconscionable provisions of the petitioner's appeal bond, demanded and given in order that it might have the judgment and decision of the court below reviewed by this honorable court. The bond was exacted at a time when the World War was raging, when

the economic conditions of our country were disturbed and shaken, and when it seemed not only possible but reasonably certain that compensation for labor and prices to be paid for all commodities entering into our economic existence would soar and reach unprecedented heights, and that the old order of things would soon pass away. The bond was required when it was known that a period of years must elapse before final adjudication by this court, and during which period of time the petitioner would be without remedy to protect its property from confiscation, should it fail in its appeal. The bond was given by the petitioner because it had no other recourse. But two courses were open to it. One was to bow to the decree of the court below, and accept bankruptcy as a result of the ordinance rate, and the other was to give the bond exacted and trust to the equitable protection of this court to prevent the disaster that any other course would have brought upon the petitioner.

The position of Shylock standing at the bar of justice, demanding his pound of flesh, merely because it was so written in the bond, is the parallel of the City of Lincoln demanding that the petitioner shall be destroyed merely because the bond so provides.

Again, we state that such a bond should not have been required, and that having been required, strict compliance therewith should not be exacted, for to do so would violate the commands of this court's mandate.

(c) The court did not have clearly before it the fact that after the sending down of its mandate in 250 U. S. 256, the petitioner immediately availed itself of the "without prejudice" clause of the court's opinion, and instituted in the court below a new proceeding wherein it was declared that the ordinance rate was, and since the entry of the final decree below had been non-compensatory and confiscatory of petitioner's property, and wherein petitioner prayed an injunction against the enforcement of the provisions of said ordinance from and

after the 23rd day of September, 1915; and that pursuant to the prayer of its petition an order was entered enjoining the City of Lincoln from in any way enforcing any of the provisions of said ordinance; that an injunction bond was given by your petitioner, as required by the court below, and that the injunction so granted has ever since been in full force and effect; all of which more fully appears from Exhibits "A," "B" and "C," attached to petitioner's motion for rehearing.

Under the facts and circumstances recited above it would seem that the respondent should be without authority to set aside the injunction granted by him by entering the orders complained of, and to require the petitioner to make restitution of all sums collected in excess of the ordinance rate from and after the 23rd day of September, 1915.

It may be that upon the final hearing of the new suit instituted in the court below the injunctive order may be set aside; but until such final hearing or until the order is set aside in that case, the injunction granted is binding upon the City of Lincoln, and it should not be permitted under the orders of the respondent to collect alleged overcharges in violation of the provisions of said injunction.

(d) It would also seem that the court did not give due consideration to the fact that under the rule announced in the Arkadelphia case the petitioner's liability to make restitution of overcharges is not limited to the amount of the bond, but that liability extends over and beyond the bond to make restitution for all overcharges collected; that petitioners appeal bond is not in any sense sufficient to cover the overcharges alleged to have been collected by the petitioner, and that as petitioner's liability is not fixed by its appeal bond, it should not be required to make restitution of all sums collected in excess of the ordinance rate, merely because its appeal bond provides for the refund of a certain portion of such excess charges. In any event, petitioner's obligation to make refund above the amount fixed by the bond is not de-

termined by the provisions of said bond, and the orders of the respondent compelling restitution of all overcharges should not have been sustained because the bond provides for restitution of a portion of such overcharges.

This honorable court has cited as sustaining its position herein, the case of *Missouri* v. *Chicago, Burlington and Quincy Railroad Company,* 241 U. S. 533. We believe, however, that a close analysis of the facts of that case will show that the court did not announce any rule therein which in any way militates against the granting of the relief prayed for by the petitioner. In that case the decree held that the rate under consideration was valid and binding during a specific period of time. The case as we read it, does not hold the rate to be valid and binding for any period of time subsequent to the adjudication. It is the period subsequent to September 23, 1915, during which conditions were vastly changed by reason of the international conflict and during which we contend that we should be permitted to show that the ordinance which was found valid in 1915, was non-compensatory and confiscatory; and we respectfully represent that in this contention we are fully justified by all the facts and circumstances now before the court.

WHEREFORE, for the reasons herein stated, the petitioner respectfully prays that its motion for rehearing be granted, or that the judgment and opinion of the court be modified as prayed in petitioner's petition and motion for rehearing.

Respectfully submitted,

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Attorneys for Petitioner.

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EX PARTE IN THE MATTER OF LINCOLN GAS & ELECTRIC LIGHT COMPANY, PETITIONER.

ON PETITION FOR REHEARING OF APPLICATION FOR WRIT OF MANDAMUS.

No. 29, Original. October Term, 1920.—Decided October 24, 1921.

Where a decree of the District Court, upholding as adequate a gas rate fixed by a city ordinance, was affirmed by this court without prejudice to the bringing of a new suit to restrain enforcement if changed conditions should make the rate confiscatory,—

Held: (1) That, until such new suit was begun, the ordinance was established by the decision as the lawful and exclusive measure of the rates chargeable by the plaintiff gas company. P. 9.

(2) That the original suit did not end until the going down of the mandate from this court. P. 9.

(3) That a new suit filed at that time, and the granting of a restraining order therein, could affect only the then future operation of the ordinance, and could not oust the District Court of its jurisdiction, ancillary to the former suit, to award restitution, gauged by the ordinance rate, of overcharges exacted by the plaintiff from its consumers during the period between the original decree of that court and the going down of the mandate. P. 9.

(4) That the ancillary jurisdiction was independent of whether the plaintiff's injunction bond, in the former suit, was sufficient to cover the overcharges. P. 10.

Rehearing denied.

Mr. Robert A. Brown, Mr. Maxwell V. Beghtol, Mr. Charles A. Frueauff and *Mr. Wade H. Ellis*, in support of the petition.

MR. JUSTICE PITNEY delivered the opinion of the court.

Petitioner asks a rehearing of this matter and a reconsideration of our decision of June 1, 1921, 256 U. S. 512, by which we refused to award a mandamus requiring the Judge of the District Court to refrain from exercising jurisdiction in the cause of *Lincoln Gas & Electric Light Co. v. City of Lincoln, et al.*, after our disposal of the final decree on appeal, for the purpose of requiring restitution to gas consumers of amounts exacted by petitioner pending the suit in excess of the maximum rates permitted by the ordinance that was under attack therein.

We have permitted the petition for rehearing to be filed and shall state briefly why it cannot be granted.

In our opinion in the principal case delivered June 2, 1919 (250 U. S. 256), while sustaining generally the decree of the District Court dated September 23, 1915, which dismissed the bill of complaint, we nevertheless said (p. 268) that the decree should be modified "so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation, and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions." To that end we modified the decree so that the dismissal of the bill as to the rate ordinance should be "without prejudice to the commencement of a new action to restrain the enforcement of said ordinance hereafter," and affirmed it as thus modified.

Upon the going down of the mandate the District Court on January 6, 1920, entered an order modifying its decree of September 23, 1915, as required, and retaining jurisdiction for the purpose of requiring the petitioner to make refund and restitution to consumers of gas for amounts collected over and above the legal rate pending the litigation; and against this order relief was sought through mandamus.

In the opinion refusing a mandamus, in response to the contention that the jurisdiction of the District Court to require restitution did not extend to overcharges subsequent to September 23, 1915, we stated that the decree of that date was conclusive evidence that petitioner had failed in the attempt to prove the ordinance rate noncompensatory, and hence that it not only was lawful and binding, but would so continue unless and until the petitioner, under the leave reserved, should begin a new suit and maintain its contention that the rate, through changed conditions, had become noncompensatory. It is now urged that this was based upon the assumption that no suit had been instituted attacking the rate since our decision of the appeal in the main case; and petitioner sets up, as the principal ground for asking a rehearing, that on January 6, 1920, a new suit was brought by it in the same court against the city and its officials for the purpose, as stated, of taking advantage of the permission granted in the mandate following our decision of June 2, 1919.

Petitioner exhibits a copy of its petition in the new suit, which is in the nature of a bill in equity; also a copy of a restraining order granted by the District Court thereon.

In our opinion refusing the mandamus we did not mention the new suit, for the very good reason that it had not been brought to our attention; not being mentioned either in the petition for mandamus, in the return of the

district judge to our order to show cause, or in the briefs or arguments on either side.

It hardly was to be expected that the commencement of a new suit asking for an injunction because of changed conditions would oust the court of its jurisdiction over proceedings ancillary to the suit theretofore terminated and having for their purpose the bringing to a conclusion of rights arising out of it; and it will easily be seen that it can have no such effect.

Instead of addressing itself to the question whether the rate ordinance was confiscatory under the conditions existing at the time of bringing the suit and likely to continue thereafter, it is largely devoted to an attack upon the adequacy of the rate, and consequently upon the validity of the ordinance, from and after September 23, 1915; there being specific averments and prayers as to the period from that date to the commencement of the new suit, with only inferential reference to the operation of the ordinance rate thereafter.

But the former suit was terminated not upon the making of the District Court's decree of September 23, 1915, nor upon the announcement of our decision affirming it on June 2, 1919, but upon the going down of the mandate, which, for reasons that do not appear, was delayed until January 5, 1920. Until that date the ordinance was established by the decision as the lawful and exclusive measure of the rates chargeable by petitioner for gas served to consumers, and the gauge by which its liability to make refund for overcharges exacted during suit was to be determined. The beginning of the new suit, and the granting of a restraining order therein, can properly have effect only with respect to the then future operation of the ordinance, and cannot affect the measure of recovery to be applied by the District Court in awarding restitution for the period covered by the former suit; much less its juris-

diction to award such restitution. See *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Merrick Co.*, 254 U. S. 376.

In truth the new suit, in so far as it may purport to bear at all upon the proceedings against which mandamus was sought, is not within the leave reserved in the "without prejudice" provision, indeed is in the nature of a bill of review, although leave to file such a bill was asked of us pending appeal in the former suit and refused for reasons stated in 250 U. S. 261-262. In any aspect, neither the pendency of the new suit, nor the granting of a restraining order therein, constitutes the least reason for granting the rehearing asked for.

Other points are suggested, but they are without substance. The fact, if it be a fact as alleged, that the bond given in the former suit is not sufficient in amount to cover the aggregate overcharges collected by petitioner *pendente lite* in excess of the ordinance rate, manifestly raises no question about the jurisdiction of the District Court to award restitution.

Rehearing denied.